Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Teamsters Local Union No. 213,

applicant,

and

Kristoff Holdings Ltd., d.b.a. Kristoff Trucking,

employer,

Board File: 29938-C

Teamsters Local Union No. 213,

complainant,

and

Kristoff Holdings Ltd., d.b.a. Kristoff Trucking,

employer,

Board File: 29944-C

Neutral Citation: 2014 CIRB 714
February 19, 2014

The Canada Industrial Relations Board (the Board) was composed of Mr. Graham J. Clarke, Vice-Chairperson, and Messrs. John Bowman and Richard Brabander, Members. Argument as to the Board's jurisdiction was heard by videoconference on September 26, 2013.

Canada

Appearances

Mr. Bryan W. Savage, for Teamsters Local Union No. 213;

Mr. Ryan Copeland, for Kristoff Holdings Ltd., d.b.a. Kristoff Trucking.

These reasons for decision were written by Mr. Richard Brabander, Member.

I. Introduction

[1] The threshold issue in these two matters is whether or not the operations of a trucking company based in British Columbia (B.C.) constitute a "federal work, undertaking or business" subject to the *Canada Labour Code (Part I Industrial Relations)* (the *Code*).

[2] Pursuant to section 20 of the *Canada Industrial Relations Board Regulations, 2012* (the *Regulations*), although the Board has not consolidated proceedings in the two separate matters before it, it had decided that it was appropriate to consider the submissions of the parties and to hear final argument on the constitutional jurisdiction issue in relation to them both together, and so notified the parties in its notice of hearing letter dated August 23, 2013.

[3] The answer to the constitutional law question of whether the *Code* governs the labour relations of the parties will either permit or foreclose further inquiry by the Board into the merits of both matters.

[4] Only the threshold jurisdictional issue was argued by the parties before the Board by videoconference on September 26, 2013.

II. Nature of Proceedings and Jurisdictional Issue

[5] The issue of the constitutional jurisdiction of the Board arose with respect to an application for certification (the application) and an unfair labour practice complaint (the complaint), both filed with the Board by the Teamsters Local Union No. 213 (the applicant) in relation to employees of Kristoff Holdings Ltd. doing business as Kristoff Trucking (Kristoff Trucking or the employer).

[6] The sole question addressed in this decision is whether or not the operations of Kristoff Trucking constitute a "federal work, undertaking or business" subject to the *Code*.

[7] The factual record on which the parties based their written arguments and oral presentations, and on which the Board relies in deciding this issue, consisted of all information material to it found in the extensive submissions of both parties.

[8] These facts, although the significance of some of them was characterized differently by each party, were not contested in material degree; they were agreed to constitute an adequate and appropriate record for the argument on the constitutional jurisdiction of the Board, and are summarized below.

III. Background

[9] On April 9, 2013, the applicant filed an application for certification as bargaining agent, pursuant to section 24 of the *Code*, for a bargaining unit of all employees of the employer in British Columbia, excluding office and management staff. The application stated that the proposed unit comprised approximately 30 employees.

[10] On April 12, 2013, the applicant filed a complaint of unfair labour practice pursuant to section 97(1) of the *Code*, alleging violation by the employer of sections 94(1), 94(3)(*a*),(*b*) and (*e*), and section 96.

[11] On April 17, 2013, the employer responded to the application by two letters from its counsel, raising the objection that the employer is not a federal undertaking and is therefore not subject to the *Code*, and that the Board lacks constitutional jurisdiction to deal with the application. It made the same objection in relation to the complaint.

[12] Subject to that position, the employer also objected to the proposed bargaining unit description and provided the documents and information requested by the Board. Its confirmation that it had complied with the requirement for posting of notice of the application was received by the Board on April 20, 2013.

[13] Also on April 17, 2013, the employer provided extensive information in a separate letter with attachments. The letter included written submissions in support of its objection to the Board's jurisdiction, made "on the basis that the [e]mployer is not a federal undertaking, and is therefore not subject to the jurisdiction of the ... *Code*."

[14] On April 19, 2013, the employer reiterated its jurisdictional objection and subject to it, responded to the complaint, setting out an extensive argument in its letter and attaching to it a considerable number of additional documents.

[15] These relatively comprehensive submissions provided details of what the employer characterized as its trucking and warehousing business, of its operations and its workforce. They also included documentation relating to a previous application for representation rights made by the applicant under the British Columbia *Labour Relations Code*, for essentially the same unit of employees. The British Columbia Labour Relations Board (the B.C. Board) had held a hearing to deal with that application, had ordered a representation vote and had dismissed the application on February 15, 2013, based on the result of that vote.

[16] On April 19, 2013, under separate cover, the employer also provided further particulars which had been requested by the Board relating to part-time and casual employees in its workforce.

[17] On April 24, 2013, the applicant replied to the employer's response to its complaint of unfair labour practice, stating that it would reply to the employer's jurisdictional objection in its forthcoming reply regarding the application for certification, and requesting that its application and complaint be heard by the Board at the same time.

[18] On April 26, 2013, the applicant replied to the employer's response to its application for certification, providing the Board with detailed information and written submissions. It took the position that "the [e]mployer is a federal undertaking, and as such is subject to the jurisdiction of the Board."

[19] The portion of its reply dealing with the jurisdictional issue outlined the type of work and manner of its performance with respect to loads, containers, materials and destinations of the trucking assignments, summarizing its understanding of certain relevant features of the business. It also emphasized certain aspects of some work which had on occasion involved trips to two destinations outside the province of British Columbia: Edmonton, Alberta, and the Wolverine Mine in southeast Yukon, operated by Yukon Zinc.

[20] On May 8, 2013, the employer provided, by way of surreply, additional details of its operations, together with several corrections to information it had initially presented to the Board relating particularly to the work which had required extra-provincial travel by its truckers. The information as corrected which is material to the question of jurisdiction was not contested. With the other information in these Board files relevant for this decision, it is summarized below.

[21] On September 26, 2013, the Board heard final arguments on the constitutional jurisdiction issue, based on the material facts in the record, as had been agreed during a case management teleconference with the parties held by the Board on July 3, 2013.

IV. Facts

[22] The constitutional facts on record are summarized below.

[23] Kristoff Trucking operates a trucking and warehousing business based in Port Edward in northwest British Columbia (B.C.).

[24] On the date the application was filed, there were 43 people on the employer's payroll, some of whom were office and management staff.

[25] The employer's main business operations involve local warehousing and shipping work. It has a large warehouse and storage yards in Port Edward, as well as storage yards in Prince Rupert and Kitimat, all in B.C.

[26] It estimates that approximately 80 to 85% of its business is conducted in and around Port Edward, B.C., much of this for one of its main clients, Quickload.

[27] The employer owns 24 tractor trucks, only one of which still in service at the date of hearing has had monthly or quarterly operating licences for Alberta, a cautious approach said by the employer to be "due to the uncertain and intermittent nature of the extra-provincial work there". The corresponding insurance coverage relating to the use of this particular truck in Alberta was also obtained monthly or quarterly, and there was a break in this coverage of approximately one week, from January 31, 2013, to February 8, 2013.

[28] Kristoff Trucking owns 17 trailers, none of which is licensed for Alberta. It rents other trailers as necessary, approximately six in number at the date of hearing, and these are licensed in Alberta. The Board accepts as an uncontested explanation for this the stated understanding of the employer that this is a common practice of trailer renting companies because of favourable tax laws in Alberta. The employer added mention of its understanding that some physical location within the province of Alberta is necessary in order to license a trailer there.

[29] There is no evidence that Kristoff Trucking had acquired, leased or controlled any premises in Alberta.

[30] The employer's principal client, Quickload, also supplies trailers that are pulled by the employer's tractors for many of the jobs performed by the employer, and some if not all of these trailers are licensed in Alberta.

[31] The single truck licensed for Alberta was also previously licensed for the Yukon, but that licence expired in August 2013, and has not been renewed. The employer did have a second truck licensed in Alberta beginning in November 2012, but that truck's engine broke down in February 2013, and its licence expired on August 31, 2013. Its B.C. licence plates were cancelled, but the employer explained that its Alberta plates were not cancelled because it does not believe that any refund would be paid for so doing.

[32] However, if the employer takes on a job requiring a trip outside B.C. with another truck, it obtains the necessary permits and licences on a temporary basis.

[33] Nevertheless, it did purchase an Alberta dimensional permit valid for a full year from February 7, 2013, until February 6, 2014, because of its low cost of $55.00 and the fact that it covers all the employer's trucks. A dimensional permit allows the use of trucks, the dimensions of which exceed the prescribed vehicle size limits.

[34] The employer's extra-provincial work, the nature and extent of which are summarized in detail below, has been done primarily for two client groups: Mammoet companies based in Edmonton, Alberta, and Yukon Zinc, which operates the Wolverine Mine in the Yukon.

[35] As the details below reveal, the hauling work done by the employer for Mammoet increased somewhat in late 2012, then became less frequent and ended in early 2013. It involved the transport of equipment to or from Edmonton for projects in Prince Rupert and Kitimat, B.C. Now that the Mammoet equipment is on site and construction is proceeding, the employer currently expects no further transport work from this client which would require such pick-ups or deliveries of equipment in Alberta.

[36] However, work for this client may not be permanently at an end. It remains possible that upon completion of these construction projects some years hence, the employer might be called on once again, and agree, to haul the Mammoet equipment or other materials back to Edmonton, or elsewhere outside B.C., as noted by the applicant. The employer acknowledged that it may contract again with Mammoet in future to remove the construction equipment, but stated that it had no existing contract to do so. Its transportation work for this client ceased in the spring of 2013.

[37] During 2012 until November, but not since then, the employer hauled cement destined for the Wolverine Mine in the Yukon, but hauled it only within B.C., from Port Edward to Stewart. Yukon Zinc, using its own tractor trucks, would transport lead ore to Stewart, and then itself use those trucks to haul the cement from Stewart, B.C., back across the provincial border to its location in the Yukon.

[38] Quickload, the employer's principal client, performed the necessary storage and transloading of materials. As a contractor engaged by Yukon Zinc, Quickload in turn subcontracted the work of certain transportation of materials to Kristoff Trucking. Previously, the employer had made trips across the border to Yukon Zinc to deliver a re-agent used in the mine, and on four such occasions had also hauled lead ore from the mine back to Port Edward, B.C., on the return leg of the trip. In these instances, Kristoff Trucking would transport a container of re-agent material from Port Edward, B.C., to Quickload's warehouse there, where Quickload would either store it or transfer it onto flat deck trailers, which Kristoff Trucking, in turn, would then haul to the mine. This sequence was reversed on the four occasions when the employer brought lead ore back from the Wolverine Mine in the Yukon, to Port Edward, B.C.

[39] The employer provided the Board with a list of all its out-of-province trips between January 1, 2012, and April 9, 2013, the date the application was filed. The list shows the date of each trip and the corresponding client name, departure and destination locations, charge, hours, wages paid and whether or not any load was hauled back on the return leg of the trip.

[40] During this period of approximately 15.3 months, the employer conducted 57 cross-border trips, of which 16 had back-hauls. The employer calculated that this extra-provincial work accounted for 5.62% of its business income, 2.72% of its payroll, and 3.68% of its total truck usage for the corresponding time period.

[41] This list of out-of-province trips showed none at all in six of the months during that period (or in seven of them, if including April 2013 up to April 9). It did show one extra-provincial trip in each of March and May, six in July, one in October, nine in November and 11 in December, 2012, as well as 13 in January, 11 in February and four in March, 2013.

[42] In its written outline of argument filed September 20, 2013, the employer informed the Board that since June 1st, 2013, the employer had performed an additional 11 extra-provincial trips, all for the Yukon Zinc corporate entities. However, there was no evidence that these 11 trips over four months were on any particular schedule, and counsel informed the Board that at the date of hearing, it was uncertain whether any such work would occur in the future, and if so, how often.

[43] Thus, the total number of extra-provincial trips made by the employer during the period from January 1, 2012, to September 26, 2013, a period of almost 21 months preceding the Board's hearing, was 68. Although these trips were not spread evenly throughout those months, this work could be expressed as requiring an average of approximately 3.24 out-of-province trips per month during the period mentioned.

[44] All the information provided to the Board shows that the employer handles various materials for different customers. It provides transportation services for containers and equipment, trucking and hauling of raw materials, as well as warehousing and storage services. There is no evidence that the employer hauls or delivers its own products, goods or materials.

[45] The employer's website advertised its trucking and transportation business in the following terms:

> **Kristoff Trucking** has emerged as a leading regional truck load carrier in BC. By blending the latest in trucking and transport technology with the traditional values of quality service, on-time delivery and responding to the needs of the customer, **Kristoff Trucking** has become the service carrier of choice.
>
> Providing local and long haul cartage throughout the BC Region and across Canada. **Kristoff Trucking** is the reliable source for all your trucking needs.
>
> ...
>
> To meet the needs of the customer, **Kristoff Trucking** offers the following services:
>
> - Service area coverage includes all of BC and throughout Canada
> - Dependable On Time Delivery
> - Professional Drivers
> - Competitive Prices
> - Container Stuffing/De-stuffing
> - Flexible Services
> - Container Service
> - Chassis Rentals
> - Reefer Service
> - Flatdeck Service
> - 24hr and same day service
> - Warehousing and storage

[46] Neither during the period from January 1st, 2012, to April 9, 2013, covered by the list of out-of-province trips mentioned above, nor at the date of the Board's hearing, did the employer have any steady or ongoing contracts for extra-provincial transportation work. There is no evidence that it ever had such ongoing contracts.

[47] Although it has no extended contracts for any work it might perform to or from the Yukon, the employer also stated that the extent of such services in the future was unknown at the date of hearing. It added that it sometimes contracts out extra-provincial trucking work to owner-operators or larger trucking companies, and that it had done this for approximately 10% of its listed extra-provincial trips, and also since then for Yukon Zinc.

[48] The employer further informed the Board that, on occasion, it had declined cross-border opportunities "because it did not have capacity in light of its intra-provincial operations."

[49] On a relatively few other occasions, however, it did arrange to have more than one truck serving the extra-provincial transportation needs of its clients on the same day. Once or twice, it had three or four trucks on the road outside B.C. on the same day. Once, on December 3, 2012, as appears from the detailed breakdown of out-of-province trips the employer provided to the Board, it had managed to put 11 trucks at the service of two of its clients, with eight of those running on B.C. and Alberta roads, and three from B.C. into the Yukon Territory.

[50] Whether these occasions required the employer to contract out some or all of this work does not appear in the record.

[51] The base of operations for the employer is at Port Edward, B.C., on the Pacific coast of western Canada. The Board was informed during the hearing that the driving distance from there to Edmonton, Alberta, is approximately 1440 kilometers. The Board was also informed that the driving distance from Port Edward to the Wolverine Mine operated in the southeast Yukon by Yukon Zinc, although somewhat shorter, would require a similar driving time, depending as it does, in part, on road and weather conditions.

[52] Two of the employer's own tractor trucks are equipped with sleeper cabs. The Board was informed at the hearing that these were not necessarily acquired or used for work involving cross-border travel. Although a return trip to and from either of the two out-of-province destinations mentioned would apparently require at least two days, and the employer apparently has no facilities outside B.C., no details of accommodations for the drivers involved in those trips were provided.

[53] With reference to the statements quoted in paragraph 45 above which appear on the employer's website, no evidence was provided to the Board of business operations "across Canada" or "throughout Canada" having been actually conducted by the employer. The only evidence that its trucking services crossed the provincial boundary of B.C. is summarized above.

V. Positions of the Parties

A. The Applicant

[54] In arguing that Kristoff Trucking is a federal undertaking subject to the jurisdiction of the Board, the applicant union emphasized:

- the variable number of out-of-province trips during the months reviewed, while urging that an inquiry into the true nature of the business should not be limited to or by an appraisal of the extent of such activity at any particular time, and that the Board should make a qualitative but not quantitative analysis of the extra-provincial work in examining the undertaking;
- the Board's recent application in *Stock Transportation Ltd.*, 2013 CIRB 687 (*Stock*), of the functional test described by the Supreme Court of Canada (SCC) in *Consolidated Fastfrate Inc.* v. *Western Canada Council of Teamsters*, 2009 SCC 53 (*Fastfrate*), for determining whether a transportation undertaking in Canada is subject to provincial or federal law;
- the need to decide, on the facts of the case, whether the extra-provincial aspect of the employer's business is "regular and continuous" as opposed to "casual," and the requirement to examine the whole undertaking and the pith and substance of the activity, citing *Pioneer Truck Lines Ltd.*, 1999 CIRB 31 (*Pioneer*);
- the general rather than specialized nature of the employer's trucking business in its daily or habitual operations, and that it hauls containers and various materials for different customers, rather than delivering its own goods;
- the apparent ability of the employer at times to increase the number of its cross-border trips in responding to extra-provincial needs of customers, cautioning that the constitutional jurisdiction of the employer for labour relations should not turn on the vagaries of its customer base;
- that during the last two months of 2012 and the first two months of 2013, the employer had logged 44 cross-border trips in a period of only four months;
- the website statements advertising cartage across Canada and service area coverage throughout Canada;

- that it holds itself out as standing ready to serve customers beyond the limits of B.C., citing *Pioneer, supra,* here particularly for the proposition that in certain cases, the acquisition of permits and licences reflecting this readiness may be sufficient to conclude that the undertaking extends into another province or territory on a "regular and continuous" basis.

[55] With respect to its application for certification under the provincial labour legislation of B.C., for substantially the same unit of employees, which proceedings were completed just before the filing of the application to the Board, the applicant urged before us that the Board's jurisdiction is based on statute law, and that "[p]arties by agreement can neither place themselves within the jurisdiction of the Board nor place themselves outside the jurisdiction of the Board," citing *Allcap Baggage Services Inc.* (1990), 79 di 181; and 7 CLRBR (2d) 274 (CLRB no. 778) (*Allcap*).

[56] The applicant summarized its position on this point by submitting that the parties, alone or together, can neither decline nor defeat the applicability of the law of the proper constitutional jurisdiction. In this manner, it answered the implication in the employer's statement that it had attorned to the jurisdiction of the B.C. Board, that its present application could thereby be affected or compromised or even barred.

[57] As well, by way of explanation that it had not previously been fully aware of the extent of the employer's extra-provincial operations, the applicant had stated in its April 12, 2013, complaint, that it was only after the dismissal of its application to the B.C. Board that it became clear to its business agent that the employer "on a regular and continuous basis crossed into the Province of Alberta and into the Yukon Territory." The Board also understands this submission as an indirect profession of the applicant's good faith in bringing this application, although that was not directly challenged.

[58] The Board notes that the applicant's argument assumed the indivisibility of the employer's transportation business operations, characterizing all the facts as being consistent with a determination that the employer's undertaking is subject to federal law.

[59] In summary, counsel for the applicant reiterated that there is no dispute on the facts, and that the test of regular and continuous trans-border operations was met, bringing the employer's undertaking under federal jurisdiction.

[60] Acknowledging that provincial jurisdiction would prevail if the functional test inquiry were inconclusive in establishing federal competence, the applicant submitted that it would not be necessary in that case for the Board to further consider whether provincial regulation of the employer's labour relations would impair the core of a federal head of power under the *Constitution Act, 1867*.

B. The Employer

[61] The employer stressed that labour relations in Canada are presumptively under provincial jurisdiction, and that the applicant carried the burden of displacing that presumption.

[62] It submitted that the Board should follow the guidance of the Supreme Court of Canada (SCC) in *NIL/TU,O Child and Family Services Society* v. *B.C. Government and Service Employees' Union*, 2010 SCC 45 (*NIL/TU,O*), by conducting a two-step examination of the case before it: first, by engaging in a functional analysis into the nature, operations and habitual activities of the employer to determine whether it is a federal undertaking, and then, and only if the answer then remains unclear, by applying the presumption in favour of provincial regulation, unless doing that would impair, not merely affect, the core of the federal power over interprovincial transportation.

[63] In advancing its position before the Board, the employer argued that under the constitutional division of powers in Canada and cases which have interpreted that division, there is nothing inherently federal about trucking as might more often be said to be the case for interprovincial transportation by rail or air.

[64] Further, the employer pointed to the fact that its base of operations is at Port Edward, on the west coast of B.C., and that its main work is conducted at and between Port Edward, Prince Rupert and Kitimat, all in B.C.

[65] It submitted that the fact that some of its trucks sometimes crossed the provincial boundaries into the Yukon or into Alberta, to the limited extent shown by the facts, should not attract federal regulation on the basis of a concern that such incidental occurrences are of national importance.

[66] It characterized the out-of-province work as only a small and irregular component of its business, not large in either relative or absolute terms, attributing its temporary increase prior to the spring of 2013 to two projects, neither of which was expected to involve the employer in similar work in the near future.

[67] It submitted that the numerical comparisons with its in-province work, of how many trips went outside it, how much revenue they generated, how many truck days they required, and what portion of workforce payroll they accounted for, should not be determinative of whether that extra-provincial work was regular and continuous, but that they do merit consideration nevertheless in determining the presence or absence of regular and continuous cross-border trucking operations.

[68] The employer argued that the focus of its business is mainly and clearly on work within the province of B.C. and that it is not engaged in regular or continuous extra-provincial trucking. Among several considerations advanced in support of its jurisdictional objection before this Board, the employer also emphasized that:

- it is normally and mainly a provincial trucking company, with a very small part of its business having been conducted outside B.C.;
- it has no ongoing contracts for such work, and never had any;
- it is not organized and equipped for regular extra-provincial hauling, stating that it has contracted out some of that work and declined other such opportunities for lack of trucking capacity in light of its focus on its in-province operations;
- its cross-border work has been sporadic and irregular, noting that the transportation of project equipment for Mammoet from Edmonton to Kitimat was finished;
- between June 1, 2013, and September 26, 2013, the date of the Board's hearing, only 11 trips had been made over the northern border of B.C. into the Yukon during those four summer months;

- any extra-provincial work it chooses to accept is incidental to its main operations within B.C., and is performed only when convenient;
- in some instances it has contracted that work to others, characterizing its role in such cases as that of a freight forwarding company rather than a transportation company.

VI. Applicable Law

A. Relevant Legislation

[69] The scope of jurisdiction of the Board is established by the *Code*. The relevant provisions of the *Code* reflect and respect the division of powers between the Parliament of Canada and the provinces, as set out in the *Constitution Act, 1867*.

1. The *Canada Labour Code*

[70] Section 4 of the *Code* refers specifically to its Part I entitled "Industrial Relations" under which these proceedings have been brought. It authorizes the application of Part I of the *Code* only in respect of employees who are employed on or in connection with the operation of any federal work, undertaking or business, in respect of their employers in their relations with those employees, and in respect of unions and employers' organizations composed of them :

> 4. This Part applies in respect of employees who are employed on or in connection with the operation of any federal work, undertaking or business, in respect of the employers of all such employees in their relations with those employees and in respect of trade unions and employers' organizations composed of those employees or employers.

[71] Section 2 of the *Code* constitutes a relatively extensive definitional enactment, only part of which finds direct application in this case. It defines in a non-exhaustive manner what is meant by "federal" work, undertaking or business.

[72] First, it declares that this means, in general, any work, undertaking or business that is within the legislative authority of Parliament. Then, after stipulating that what follows this primary statement is not intended to restrict its generality, it provides specific examples by listing 10 categories of works, undertakings or businesses, which are expressly included in the definition.

[73] The whole provision thus clearly defines many works and undertakings as being covered by the *Code*, and also permits better insight, in less clear situations, into what is intended to be included. This legislative technique enables a work or undertaking to be examined for its identity with, or similarity to, any of those mentioned in the definition, in assessing whether or not it is federal.

[74] For the two matters now before the Board, the relevant portion of the definition is section 2(*b*), which refers in the following terms to certain types of works and undertakings, including those involving transportation:

> 2. In this Act,
>
> "federal work, undertaking or business" means any work, undertaking or business that is within the legislative authority of Parliament, including, without restricting the generality of the foregoing,
>
> ...
>
> (*b*) a railway, canal, telegraph or other work or undertaking connecting any province with any other province, or extending beyond the limits of a province, ...

2. The *Constitution Act, 1867*

[75] There is a noteworthy and reassuring similarity of many phrases in both the *Code* enactments referred to above, and the terminology found in the constitutional division of powers provisions of the *Constitution Act, 1867*, which are its sections 91 to 95. The sense that they are both derived from and anchored in the bedrock of the constitution reinforces the fact that they serve as the foundation for the Board's jurisdiction.

[76] Only the few lines found in sections 91(29) and 92(10)(*a*) which are relevant for this case are set out below. But this link between the two *Code* provisions and the text of Canada's constitutional division of powers graphically illustrates the governing imperative that the scope of the Board's constitutional authority is derived from, depends on, extends to and is limited by the constitutional dimensions of Parliament's own authority to legislate in relation to certain subjects or heads of federal power. The resulting legal principle is acknowledged, that the Board's regulatory authority over labour relations may in this respect match, but cannot exceed, that of Parliament. It is determinative of the outcome for the parties in this case.

[77] No provision of the *Constitution Act, 1867*, specifically mentions the subject of labour relations or assigns jurisdiction over it to either the federal or provincial level of government. Because sections 2 and 4 of the *Code* refer to federal works, undertakings or businesses, the Board must determine, under the *Constitution Act, 1867*, the classification of the undertaking on which, or in connection with which, the employees sought to be represented by the applicant are employed.

[78] The relevant sections follow:

> 91. ... the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,
>
> ...
>
> (29) Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.
>
> ...
>
> 92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,
>
> ...
>
> 10. Local Works and Undertakings other than such as are of the following Classes:
>
> (*a*) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province:
>
> ...
>
> 13. Property and Civil Rights in the Province.

[79] As is apparent from these provisions, Canada's constitution assigns to provincial legislatures responsibility over local works and undertakings, and to the federal Parliament authority over all matters within the classes of subjects which are expressly excepted from provincial authority, including transportation, communications and other undertakings which connect provinces or extend beyond provincial boundaries, as mentioned in section 92(10)(*a*).

[80] In this division of constitutional authority, it may be seen that centralized control is retained by Parliament for inter-provincial or international transportation and other matters of direct

concern to Canada as a whole because they either connect several provinces or extend beyond the geographic limits of one of them. If that is not the case of the particular transportation undertaking, Parliament asserts no regulatory control.

[81] This division of powers has, in effect, assigned authority over a vast range of local works and undertakings to the provinces. Because of the way in which the division of powers is established and expressed in the *Constitution Act, 1867*, labour relations in Canada are presumptively a provincial matter, as first decided in 1925 by the Judicial Committee of the Privy Council in *Toronto Electric Commissioners* v. *Snider et al.*, [1925] 2 D.L.R. 5 (P.C.) (*Snider*).

[82] Because of the reality that so many local enterprises do not directly affect the federal nature and framework of the country, yet do represent a great proportion of business and other activity within the provinces, the courts and this Board have often remarked that in Canadian labour relations, provincial regulation is the norm and federal control is the exception.

[83] Further, the recent thrust of jurisprudence on this question is that this federal exception to provincial control over labour relations should be narrowly construed and not founded on merely incidental or minor aspects of the operations in question.

[84] In the present case, the employer raised the objection to the Board's constitutional jurisdiction from the outset. The Board begins with the presumption that labour relations fall under provincial law unless the exceptional federal jurisdiction is shown. It is conscious of the fact that federal jurisdiction is not only less usual than provincial jurisdiction, but that the trucking business is not inherently a matter for federal regulation over labour relations. In examining all the evidence, the Board carries out its statutory mandate in a manner that strives to be faithful to the constitutional division of powers, duly respectful of its duty to follow the guidance of the higher courts, and consistent with its own previous decisions.

[85] If a trucking business or transportation undertaking, viewed as a whole, may properly be said to be federal because its true nature is interprovincial or international, the Board will not hesitate to so find. But as the case law has determined, labour relations in Canada are presumed in the first instance to be subject to provincial law, unless it is shown in the case of particular

industries or, more precisely, of certain federal works, undertakings or businesses, that the specific labour relations in question must be regulated under federal law.

B. Relevant Decisions

[86] The Board has assessed with great care all the evidence put before it, and has thoughtfully considered the positions of the parties and all of the arguments presented. In so doing, and in interpreting and applying the legislation, the Board takes its guidance from the cases, and has given particular attention to those argued by counsel.

[87] The general rules to be applied in answering the question of constitutional law as it arose in this case have been established and elaborated in many cases over the years, and are summarized for convenience below.

[88] As mentioned, the 1925 judgment of the Judicial Committee of the Privy Council in *Snider, supra,* determined that in Canada, labour relations are presumptively a provincial matter, finding that, in principle, both labour relations and working conditions come within the class of subjects called "Property and Civil Rights in the Province" at section 92(13) of the *Constitution Act, 1867*, which is reproduced above.

[89] The basic rule was summarized by the SCC in *Fastfrate, supra*, as follows:

> [27] The basic rule in the division of powers over labour relations is that the provinces have jurisdiction over industries that fall within provincial legislative authority and the federal government has jurisdiction over those that fall within federal legislative authority: see ***Labour and Employment Law: Cases, Materials, and Commentary*** (7th ed. 2004), at p. 85. However, as the jurisprudence makes clear, federal jurisdiction has been interpreted narrowly in this context. In *Toronto Electric Commissioners* v. *Snider*, [1925] A.C. 396, the Judicial Committee of the Privy Council held that the s. 92(13) provincial head of power over "Property and Civil Rights" in the provinces includes labour relations. It is only where a work or undertaking qualifies as federal that provincial jurisdiction is ousted.

[90] Since *Snider, supra*, the legal test used by the Courts for determining whether labour relations of an undertaking are federal is the "functional test," which is an examination of the nature, habitual activities and daily operations of the business.

[91] The SCC recently summarized this approach in *NIL/TU,O, supra.* It is expressed in the majority opinion of the Court, at paragraph 3, as follows:

> [3] For the last 85 years, this Court has consistently endorsed and applied a distinct legal test for determining the jurisdiction of labour relations on federalism grounds. This legal framework, set out most comprehensively in *Northern Telecom Ltd.* v. *Communications Workers of Canada*, [1980] 1 S.C.R. 115 and *Four B Manufacturing Ltd.* v. *United Garment Workers of America*, [1980] 1 S.C.R. 1031, and applied most recently in *Consolidated Fastfrate Inc.* v. *Western Canada Council of Teamsters*, 2009 SCC 53, [2009] 3 S.C.R. 407, is used regardless of the specific head of federal power engaged in a particular case. It calls for an inquiry into the nature, habitual activities and daily operations of the entity in question to determine whether it constitutes a federal undertaking. This inquiry is known as the "functional test". Only if this test is inconclusive as to whether a particular undertaking is "federal", does the court go on to consider whether provincial regulation of that entity's labour relations would impair the "core" of the federal head of power.

[92] Because the *Constitution Act, 1867*, does not specifically assign authority for regulating labour relations to either level of government, the Supreme Court of Canada has explained and reiterated in many decisions how to make the necessary determination as to whether the labour relations of a particular entity fall under federal law.

[93] The Board follows the guidance of the SCC judgment in *Northern Telecom Ltd.* v. *Communications Workers*, [1980] 1 SCR 115 (*Northern Telecom*), which set out the applicable principles. These were recently cited by the SCC in *NIL/TU,O*, *supra*:

> [13] The principles underpinning this Court's well-established approach to labour relations jurisdiction are set out by Dickson J., writing for a unanimous Court, in *Northern Telecom*. The case dealt with the jurisdiction of the labour relations of a subsidiary of a telecommunications company which was itself unquestionably a federal "work, undertaking or business" under s. 92(10)(*a*) of the *Constitution Act, 1867*. Adopting Beetz J.'s majority judgment in *Construction Montcalm*, Dickson J. described the relationship between the division of powers and labour relations as follows:
>
> (1) Parliament has no authority over labour relations as such nor over the terms of a contract of employment; exclusive provincial competence is the rule.
>
> (2) By way of exception, however, Parliament may assert exclusive jurisdiction over these matters if it is shown that such jurisdiction is an integral part of its primary competence over some other single federal subject.
>
> (3) Primary federal competence over a given subject can prevent the application of provincial law relating to labour relations and the conditions of employment but only if it is demonstrated that federal authority over these matters is an integral element of such federal competence.
>
> (4) Thus, the regulation of wages to be paid by an undertaking, service or business, and the regulation of its labour relations, being related to an integral part of the operation of the undertaking, service or business, are removed from provincial jurisdiction and immune from the effect of provincial law if the undertaking, service or business is a federal one. [p. 132]
>
> [14] He then set out a "functional test" for determining whether an entity is "federal" for purposes of triggering federal labour relations jurisdiction. Significantly, the "core" of the telecommunications head of power was not used to determine, as part of the functional analysis, the nature of the subsidiary's operations:

(5) The question whether an undertaking, service or business is a federal one depends on the nature of its operation.

(6) In order to determine the nature of the operation, **one must look at the normal or habitual activities of the business** as those of "a going concern", without regard for exceptional or casual factors; otherwise, the Constitution could not be applied with any degree of continuity and regularity. [Emphasis added; p. 132.]

[94] As described in the following excerpts of the Board's decision in *Pioneer, supra*, in the transportation industry the Board applies a particular test for determining whether the operation is under federal jurisdiction:

[15] The Board has developed a test for determining whether or not a transportation operation connects provinces or extends beyond the limits of a province, so as to bring the operation under federal jurisdiction. The overall consideration is whether the extra-provincial aspect of the business is "regular and continuous," as opposed to "casual," based upon an assessment of the particular facts in each case. The leading cases that have established the guiding principles in this area include:

- Attorney-General for Ontario et al. v. Winner et al., [1954] 4 D.L.R. 657 (P.C.)

- Regina v. Toronto Magistrates, Ex Parte Tank Truck Transport Ltd., [1960] O.R. 497 (H.C.J.)

- Regina v. Cooksville Magistrate's Court, Ex parte Liquid Cargo Lines Ltd., [1965] 1 O.R. 84 (H.C.J.)

- Re Ottawa-Carleton Regional Transit Commission and Amalgamated Transit Union, Local 279 et al. (1983), 44 O.R. (2d) 560 (C.A.)

[16] The principles outlined in these decisions may be summarized as follows:

1. The whole undertaking, which is in fact being carried on, determines the jurisdiction within which it falls. One must look at the "pith and substance" of the activity. Whether or not there is an interconnecting activity depends upon the facts of each case and the "pith and substance" of the applicable Act or Regulation (*Attorney-General for Ontario et al.* v. *Winner et al., supra*, at pages 679-680).

2. The undertaking that connects or extends into another province must do so on a regular and continuous basis to be found to be within federal jurisdiction, regardless of whether the extra-provincial work is greater or less than the intra-provincial work. Percentages are not a sound basis upon which to determine "regular and continuous" (*Regina* v. *Toronto Magistrates, Ex Parte Tank Truck Transport Ltd., supra*, at page 508).

3. Extra-provincial trips do not have to be predetermined in order to be considered "regular and continuous." In certain cases, where the "applicant stands ready at any time to engage in hauls outside the boundaries of the [province] at the instance of any of its customers, and for that purpose has gone to the pains and expense of acquiring transport permits and licences from a number of jurisdictions" may be sufficient to constitute "regular and continuous" (*Regina* v. *Cooksville Magistrate's Court, Ex parte Liquid Cargo Lines Ltd., supra*, at pages 88-89).

4. In assessing the facts in relation to "regular and continuous," a qualitative as opposed to a quantitative approach is proper (*Re Ottawa-Carleton Regional Transit Commission* and *Amalgamated Transit Union, Local 279 et al., supra*, at page 570).

[95] The point mentioned above, that to be considered regular and continuous, extra-provincial activity need not, in certain cases, be scheduled ahead of time if the business operator is ready and willing to provide it if and when requested, also found effect in the Board's decision in *Autocar Royal (9011-4216 Québec Inc.)*, 1999 CIRB 42 (*Autocar*):

> [49] The employer challenged the Board's jurisdiction and denied that Odyssée and Autocar Royal met all criteria set out in section 35 of the *Code*. Furthermore, while admitting that there is common control, the employer argued that there is a lack of interrelationship in their activities, except in the case of charters. Autocar Royal operates mainly in tourist travel while most of Odyssée's work is interurban transport. Charters account for only a small part of both companies' operations. The employer also argued that the only activity covered by the application is the charter work. It submitted that a partial single employer declaration is sought, which is not admissible under the *Code*.
>
> [50] The employer contested the Teamsters' allegations as to employee transfers between the two companies and denied that the acquisition of Autocar Royal had resulted in the erosion of Odyssée employees' rights. It claimed that, since Odyssée never held a permit to carry out trips in the city of Montréal, it had not lost any work in that area. On the contrary, referring to the 140 contracts that have been remitted to Odyssée by Autocar Royal, it argued that Odyssée had benefited from the acquisition of Autocar Royal. In the absence of evidence as to the erosion of the bargaining unit, the employer requested that the application be dismissed.
>
> [52] With respect to the issue of jurisdiction, the Board in numerous cases has developed a test to determine whether a transportation operation connects provinces or extends beyond provincial boundaries, within the meaning of section 92(10)(*a*) of the *Constitution Act, 1867*, and section 2(*b*) of the *Code*, which defines a "federal work, undertaking or business." The test requires a determination that the extra-provincial aspect of the business is regular and continuous as opposed to situations where such activities are carried out on a casual or exceptional basis.
>
> [53] It should be noted, however, that the concept of "regularity and continuity" does not mean that the extra-provincial transportation is subject to or must be carried out in accordance with a predetermined schedule. It is sufficient to find that the business operator is ready and willing to provide extra-provincial transport, if and when customers request such service. It should also be noted that the test does not involve a quantitative approach; therefore, even when the extra-provincial aspect of a business is only a small percentage of the overall operations, the operations may nevertheless come within federal jurisdiction if this small percentage meets the "regular and continuous" test (see *Re Ottawa-Carleton Regional Transit Commission and Amalgamated Transit Union, Local 279 et al.* (1983), 44 O.R. (2d) 560 (C.A.); *Burns Foods (Transport) Ltd.* (1990), 81 di 114 (CLRB no. 809); and *The Gray Line of Victoria Ltd.* (1989), 77 di 169; and 5 CLRBR (2d) 226 (CLRB no. 741)).
>
> [54] In the present instance, Odyssée not only holds the requisite permits for Ontario and New Brunswick as well as thousands of dollars of insurance in order to travel to the United States, but furthermore the documentary evidence shows that the company also operates an extra-provincial charter service, regularly making trips to various points outside Quebec. Over the past few years, its charter travel varied between 67 and 105 trips a year, amounting to an average of approximately 1 trip to 2 trips per week. Furthermore, such transport is consistently provided when requested by customers. In accordance with our case law, the Board considers that Odyssée's extra-provincial activities meet the established test and are sufficient to bring the company within federal jurisdiction. Having

concluded that Odyssée is a federal undertaking, it is clear that Odyssée and Autocar Royal constitute businesses that come under federal jurisdiction.

[96] As these passages also indicate, the amount and proportion of extra-provincial work, although these are factors to consider in characterizing the nature of the operations in question, do not offer a sound basis for determining labour relations jurisdiction.

[97] The Board assesses all the available information and relevant factors, but tends to view such percentages with caution, as they offer only a general indication of the regular and continuous nature of the operations in question. If the percentage of such work were itself determinative, then the determination of which constitutional jurisdiction governs would depend on the proportion of that work at any given time, as well as on the time frame examined.

[98] This is precisely why, in seeking to determine whether federal jurisdiction applies, the Board looks into the true nature of the entire business operations or undertaking involved for clear evidence that its extra-provincial operations have a regular and continuous quality within those business operations. As well, the Board is mindful of the reality that changes in the business of the employer in the future cannot easily be predicted.

[99] Therefore, a careful review of the true nature of the business covering a reasonable period of time prior to the date of hearing will reveal whether the extra-provincial work is sufficiently regular and continuous to serve as a sound basis, reasonably expected to be more than a transient one, for deciding that the exceptional federal jurisdiction of the *Code* should apply.

[100] In *Pioneer, supra*, the Board reviewed several cases which dealt with the meaning of "regular and continuous" and whether, for example, a threshold of "frequent" extra-provincial trips might be said to be crossed. In reaching its conclusion, it emphasized the significance of basing this determination on the actual operations of the business in question, rather than attaching too easily any great significance to what the business could or might do. What is important is what it does do.

[101] In that case, the Board acknowledged that extra-provincial trips need not necessarily be predetermined in order to be found to be "regular and continuous," and that in certain cases the fact of standing ready with the requisite licences to engage in such work on request may be

sufficient to satisfy the "regular and continuous" test. But it emphasized nevertheless that the possession by the business of extra-provincial licences, without more, is not itself determinative of whether that test is met:

> [42] By way of contrast, in *The Gray Line of Victoria Ltd.* (1989), 77 di 169; and 5 CLRBR (2d) 226 (CLRB no. 741), the Board confirmed that the test was the "regular and continuous" test and, further, that regular and continuous did not necessarily mean subject to or in accordance with a predetermined schedule. It suggested that it may well mean only that the operator of the business was at any time ready and willing to provide the extra-provincial services; in other words, customers were provided with extra-provincial service consistently and without interruption whenever they requested such services. However, in that case, the Board found that Gray Line was not in fact a federal work or undertaking because, on the evidence before it, the extra-provincial trips actually taken were "sporadic at best" and therefore not sufficient to bring the operation under federal jurisdiction.
>
> [43] Similarly, in *Raynor Holdings & Investments Ltd.* (1988), 73 di 104 (CLRB no. 676), this Board held that in fact situations where it was a close call, the Board should be guided by the constitutional presumption in favour of provincial jurisdiction.
>
> [44] Consistent with the approach taken in the cases described above, the Board must consider what the business of Pioneer actually does, not what it had the power to do. As such, the extra-provincial licences are of no consequence, unless it is also established that such licences were used and such trips were made on a regular and continuous basis. As of the date of the hearing, there were no ongoing contracts involving out-of-province work. While this may (or may not) have been pure coincidence, it is an indication of the nature of the business operation, which is shown to be normally and habitually an intra-provincial trucking operation. The frequency of extra-provincial work is one indicator of the "pith and substance" of the business. At best, the extra-provincial activity in this case could be said to be irregular. The Board wishes to point out that it is not considering such work frequency as conclusive, in the sense that this factor is used as a percentage of work test to decide the "regular and continuous" issue. It is viewed merely as a general indicator of regularity and continuity.

[102] In *Medalta Distribution Services Ltd., and Exalta Transport Corp.* (1995), 98 di 6 (CLRB no. 1117) (*Exalta*), a case involving several related companies operating as a single integrated transportation business, the predecessor of this Board, the Canada Labour Relations Board (CLRB), found that 43 cross-border trips in a five-month period were not sufficiently regular and continuous to overcome the presumptive provincial jurisdiction over labour relations, mainly because in that case the demand for it was intermittent, requiring only occasional work beyond the provincial borders of Alberta.

[103] Similarly, in *The Gray Line of Victoria Ltd.* (1989), 77 di 169; and 5 CLRBR (2d) 226 (CLRB no. 741) (*Gray Line*), the CLRB, decided that 29 extra-provincial trips of several types over an 18-month period were "unscheduled and sporadic" and therefore not regular and continuous, rejecting the union's application for certification for lack of jurisdiction.

[104] In *Brinks Canada Ltd.* v. *Good*, 2005 SKCA 20 (*Brinks*), the Saskatchewan Court of Appeal reviewed a series of cases dealing with this question and observed as follows:

> [20] *Ottawa-Carleton*, now the leading case in this area, concerned the bus service operated by the Ottawa-Carleton Regional Transit Commission ["O.C. Transpo"]. The transit system operated predominately in the regional municipality of Ottawa-Carleton in Ontario, but some of its services consisted of bus routes crossing into Hull, Quebec. The buses on the interprovincial routes travelled one half of one percent of the total mileage covered by the whole system and interprovincial passengers represented two to four percent of total ridership. The Ontario Court of Appeal found that the Divisional Court had erred in discounting the small percentage of O.C. Transpo's operations represented by interprovincial traffic and deciding the case on the basis of O.C. Transpo's "habitual and normal" business. Cory J.A., as he then was, stated at pp. 461-62:
>
> A percentage of business test should not govern the determination.
>
> In my view, the quantitative approach should not be adopted. Rather, the determination of the essential issue as to whether the undertaking connects provinces should be based upon the continuity and regularity of the connecting operation or extraprovincial business.
>
> [21] In *Ottawa-Carleton*, extraprovincial service was very small relative to the intra-Ontario service but, nonetheless, O.C. Transpo buses crossed into Hull 450 times a day and carried a total of 10,000 to 11,000 passengers per day. Income derived from that traffic was in the range of $2,000,000 per year.
>
> [22] In reviewing other authorities on this issue, we note that in those cases where the extraprovincial traffic of an otherwise provincial undertaking was very minor in absolute terms, there has been a tendency to find ways to avoid describing the service as "regular and continuous" so as to sidestep a finding of federal jurisdiction. See, for example: *Zinck's Bus Co.* v. *Canada*, (1998), 152 F.T.R. 279.
>
> [23] Overall, the cases appear to reveal an underlying or unstated concern that, when a regular and continuous extraprovincial service is both a very limited portion of an undertaking's business, and also very small when measured in absolute terms, it should not have the effect of bringing the undertaking under federal jurisdiction. One of the only authorities to comment directly on that point is *Windsor Airline Limousine Services Ltd.*, [1999] O.L.R.D. 3905. In its decision, the Ontario Labour Relations Board at para. 43 quoted from *Ontario Taxi Assn., Local 1688* v. *Windsor Airline Limousine Services Ltd.*, [1980] 2 O.L.R.B. Rep. 272 at para. 59:
>
> 59. ...Suppose a small, six-cab taxi company operating in the City of Ottawa. It makes two hundred passenger trips per day. All of its daily trips are on the Ontario side of the Ottawa River, save one. By a pre-arranged contact it makes one trip daily to the City of Hull to collect and transport a student to a school in the City of Ottawa. This it does on a "continuous" and "regular" basis. Is it to be supposed that this one daily trip must qualify that taxi business as a federal undertaking, whose industrial relations fall to be regulated along with those of railways and airlines?
>
> [24] We do not believe the "continuous and regular" test should be applied so rigidly or mechanically as to create a situation where the constitutional character of an undertaking is disconnected from practical reality. A nominal or very small amount of extraprovincial activity, even if continuous and regular, is simply not of enough consequence to warrant an entire undertaking being characterized as coming under federal authority when that activity represents a very small proportion of the overall operations of the undertaking.
>
> [25] It is well established that occasional or casual extraprovincial activity does not warrant the assignment of an undertaking to s. 92(10)(*a*). See, for example: *Agence Maritime* v. *Canada Labour*

> *Relations Board*, [1969] S.C.R. 851. The reason is that, in such circumstances, extraprovincial activities do not accurately reflect the true constitutional character of the undertaking. In our opinion, the same can be said of Brinks interprovincial activity in this case, notwithstanding that it is "continuous and regular". That service consists of a once per week trip one or two blocks on the Alberta side of Lloydminster and made in the context of a run which serves customers on the Saskatchewan side of that border city. Further, the Alberta service is self-evidently only a tiny fraction of Brinks overall Saskatchewan operations. In those circumstances, the Alberta service does not have enough consequence to warrant characterizing Brinks Saskatchewan operation as a whole as an undertaking coming within the scope of s. 92(10)(*a*).

[105] These passages articulate a dimension of the regular and continuous test which can be understood as an overarching assessment or review of the totality of the facts and circumstances in each case, to ensure that the determinations reached remain faithful to the constitutional division of powers in labour matters. They serve as a practical reminder in the case now before the Board, to weigh the evidence against the importance of the decision. The removal of an undertaking and its labour relations from presumptively provincial jurisdiction is a decision of primary importance because it lies at the heart of all that can follow under the legal regime applicable to the labour relations of the employees and parties involved.

[106] The Board has had occasion in several recent cases to apply the functional test to various business operations in order to determine whether they might be subject to federal jurisdiction for labour relations.

[107] One of these is *Schnitzer Steel BC, Inc.*, 2012 CIRB 640 (*Schnitzer Steel*) where the Board found that the employer's business was properly characterized as a metal recycling one and not one of interprovincial transportation. However, the Board considered, for the sake of argument only, whether seasonal extra-provincial trips for four customers, totalling 164 trips in a one-year period, could transform the business into an interprovincial transportation undertaking. For three consecutive months in the year examined, no such trips were made. But at other times of the year, roughly 18 to 20 weekly trips were made between British Columbia and Alberta, the employer trucking its own materials, and on 5 to 10 of these, it would also haul items for third parties.

[108] Applying the "regular and continuous" test for this purpose, and using a qualitative approach to characterizing the extra-provincial work performed for third parties, the Board found these trips to be sporadic, limited and only undertaken when in the company's interest. This

work was determined not to be regular and continuous, and the services so provided were found to be only occasional.

[109] In *Autobus Idéal, Inc.*, 2012 CIRB 642 (*Idéal*), a Board decision that was not unanimous, the Board focused on certain activities of the employer which extended from Quebec across the provincial border into Ontario, in relation to the more usual operations of what was otherwise a local school bus company. The majority of a panel of the Board found itself able, in determining whether the "regular and continuous" test was met, to rely in part on the series of steps taken by the employer to prepare and plan well in advance for, and then conduct, more or less monthly, some extra-provincial charter excursions. Although these were relatively very few in number, the employer had considered them sufficient to justify its quarterly filings for fuel tax rebates with respect to the extra-provincial portion of its business.

[110] The outcome reached in the particular context of that somewhat unusual case stands as a rare example in the Board's experience of how a unique confluence of facts and circumstances can echo and give effect to the conjecture in *Pioneer, supra*, that:

> [16] ...
>
> 3. ...In certain cases, where the "applicant stands ready at any time to engage in hauls outside the boundaries of the [province] at the instance of any of its customers, and for that purpose has gone to the pains and expense of acquiring transport permits and licences from a number of jurisdictions" may be sufficient to constitute "regular and continuous" ... .

[111] The particular context in that case included clear evidence of advance planning and preparation, and of related standing insurance arrangements, for the cross-border charter excursions, complemented by other factors such as the fact that they were made whenever a customer so requested, that this demand was consistently met, and that, as a rule, the extra-provincial trips were made monthly in each of the preceding two calendar years. This serves to illustrate how a factor taking concrete steps to plan and prepare for extra-provincial trips which is generally considered as being merely one factor among many to consider, can sometimes take on somewhat unusual significance.

[112] In the result, the majority of the Board's panel found itself unable to characterize the employer's charter operations in Ontario as merely exceptional or casual. Rather, all the evidence available, taken together, enabled the majority to conclude that the facts of that case

were sufficiently indicative of regular and continuous extra-provincial activity to bring the undertaking under the *Code*.

[113] It may be noted that the dissenting panel Member's opinion included express mention of the very concern identified by the Saskatchewan Court of Appeal in *Brinks, supra*, as an "underlying or unstated" one in cases involving the application of the "regular and continuous" test. The concern is whether relatively limited cross-border activity can properly be taken as having enough consequence to describe the constitutional character of the whole undertaking as being federal.

[114] The differences between *Idéal, supra*, and the present case may be thought quite reasonably to weaken its value as guidance or a precedent. But to apply a functional test requiring inquiry into the regularity and continuity of one aspect of a transportation business, is, itself, to recognize that each case is different. The Board's appreciation of the facts in the present case, and its application to them of the stated principles, result from an inclusive and not selective consideration of its previous decisions and those of the courts. Each can be distinguished on its facts, and given more or less effect. But each is instructive, and taken together they guide the Board in the assessment it makes.

[115] Several other elements of the evidence in *Idéal, supra*, bear mention here to highlight how different the context of each case can be. The employer did not contest that it was subject to the *Code*, partly in light of its management challenges as mentioned in the decision, and no doubt partly influenced by the fact that an inspector with Human Resources and Social Development Canada, Labour Division (now Employment and Social Development Canada (ESDC)) had determined that Part III of the *Code* dealing with labour standards applied to the company and its employees, and that its business operations were subject to federal law. Further, Québec's Commission de la santé et de la sécurité du travail (CSST) had also determined that, at least for the two preceding years, the employer had been operating an interprovincial or international transportation business.

[116] The Board clearly stated that these facts were not taken as influencing its decision, let alone determinative of its authority to apply the *Code*. But they did form part of the very real circumstances affecting the labour relations of the parties.

[117] In this regard, the parties will recall that in *Allcap, supra*, the question of the constitutional jurisdiction of the CLRB arose despite the belief of the parties that their labour relations were regulated under Part I of the *Code*, after minimum wage complaints filed under Part III of the *Code* had been rejected for lack of jurisdiction. In concluding that the CLRB lacked jurisdiction because the employer in question was not operating a federal work, undertaking or business, this Board's predecessor recited its view that:

> ... agreement of the parties cannot confer constitutional jurisdiction on the Board. In the matter of its jurisdiction to exercise power under the *Code*, the Board must be correct...
>
> (pages 184; and 277)

[118] The Board continues to endorse and adhere to this statement of the law.

[119] It is important to note that in *Autocar, supra*, the "ready and willing on request" stance of the employer was also supported by quite extensive evidence of extra-provincial activity. In addition, the assignment of cross-border trips was co-ordinated by dedicated dispatchers in the absence of a predetermined schedule for those trips, all done in accordance with the regular annual permits and insurance coverages of the two related companies involved, each covering designated geographic territories.

[120] The unique combination of factors in that case enabled the Board to determine that, although the two companies did not constitute a single employer, they both met the criterion of having "regular and continuous" extra-provincial operations, bringing each of them within federal jurisdiction for labour relations.

[121] *TNT Express (Canada) Ltd.*, 2013 CIRB 670 (*TNT*), concerned a freight forwarding company which also performed certain extra-provincial work, especially when other timely arrangements for that work could not be made. In this instance, the Board found that the employer had made a "seemingly conscious decision not to engage in interprovincial or international transportation," and that its normal and habitual activities were freight forwarding.

[122] The Board determined that its apparently unscheduled interprovincial collection and delivery of goods could more properly be characterized as casual or occasional, and accordingly decided (at paragraph 70 of its decision) that those trips were "not sufficient to transform TNT

from a freight forwarder, or intra-provincial transportation undertaking, into an interprovincial transportation undertaking."

[123] Although it ultimately based its decision on a qualitative analysis characterizing the normal and habitual activities of the employer's operations as freight forwarding, it remains relevant for our case to note that the Board's decision in *TNT, supra,* was not altered by the numerical evidence of the company's extra-provincial trips.

[124] The union had suggested that at least 144 cross-border trips had been conducted within a single year, and the employer had acknowledged that there were at least 68. But because the Board adopted a qualitative rather than quantitative approach, its conclusion was based on whether such trips constituted normal and habitual activities, not on their number or their percentage of the employer's overall operations.

[125] In *Stock Transportation Ltd.*, 2013 CIRB 687 (*Stock*), the Board determined that, although the employer was prepared to conduct extra-provincial charter operations and had made nine such trips within a year, its primary activity was local transportation of students by bus to and from schools of the New Brunswick School District 2, as well as unscheduled charter trips conducted on demand within New Brunswick, of which it had carried out 779 in one year.

[126] The employer had no regular extra-provincial transportation licences, and obtained the necessary licence only when undertaking a charter trip outside New Brunswick. It stood alone from other Canadian operations of its U.S. parent company, with no interchange of drivers and no operational reliance on other bus operations outside the province. The Board's analysis of the nature of the employer's operations showed that it was a provincial undertaking and that its labour relations thus properly fell to be regulated under provincial law. The extra-provincial charters which the employer ran were found not to amount to "regular and continuous" business activities and were not of sufficient significance to enable the Board to characterize the entire undertaking as a federal one.

[127] In *Superior Propane, a Division of Superior Plus LP*, 2013 CIRB 689 (*Superior Propane*), the Board determined that the employer delivered its own propane, and found that it was not a

transportation undertaking for the purpose of section 2(*b*) of the *Code*, saying (at paragraph 4) that "[i]t does not sell transportation; it sells propane."

[128] The Board's ruling in some respects is not unlike that reached in *Schnitzer Steel, supra,* to the effect that the employer in that case was engaged primarily in a metal-recycling business. In both cases, the Board was not persuaded that the normal and habitual business activities of the employer could fairly be said to be those of a transportation undertaking.

[129] To that extent, the facts and rationale for the Board's decisions in both those cases do not provide direct parallels for guidance in the present case, where the employer's business is acknowledged to be a single undertaking providing transport, storage and handling services for third parties, and not delivery of its own goods or materials. But both *Schnitzer Steel* and *Superior Propane, supra,* do offer recent and instructive examples of the tests to be applied in examining the normal and habitual activities of the business as a whole, as a going concern. The Board did consider whether any transportation activities, properly understood, in which those companies did engage, were sufficiently inter-provincial or extra-provincial to meet the regular and continuous test. Had this been the case, it would have brought each of those entire undertakings within the ambit of the *Code*.

[130] Not only do those decisions underscore the importance of avoiding undue regard for merely incidental and occasional departures from the employer's main pattern of business of activity, they also help explain how the Board's "regular and continuous" test stands soundly on foundational rulings of the SCC, as well as reflecting many Board precedents in the consistent application of that test.

[131] In *Superior Propane, supra,* the Board emphasized that in determining the true nature of the work, undertaking or business at issue, the functional test is applied to assess the evidence relating to the usual activities of the business, without regard for exceptional or casual factors. A convenient summary of the approach followed was stated in the following way:

> [25] The leading cases from the Supreme Court of Canada (the SCC) on the scope of section 92(10)(*a*) consistently confirm that:
>
> 1. since 1925, labour relations have been presumptively a provincial matter;

Toronto Electric Commissioners v. Snider et al., [1925] 2 D.L.R. 5 (P.C.) (Snider).

2. the federal government may acquire jurisdiction over labour relations only by way of exception;

Construction Montcalm Inc. v. Min. Wage Com., [1979] 1 S.C.R. 754 (Construction Montcalm), at page 768.

Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters, 2009 SCC 53, [2009] 3 S.C.R. 407 (Consolidate Fastfrate), at paragraph 27.

NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union, 2010 SCC 45, [2010] 2 S.C.R. 696 (NIL/TU,O), at paragraph 11.

3. this exception has been "narrowly interpreted";

Consolidated Fastfrate, supra, at paragraph 27.

NIL/TU,O, supra, at paragraphs 11 and 51.

4. to determine the nature of the work, undertaking or business at issue, the trier of fact applies a "functional test";

"one must look at the normal and habitual activities of the business as those of "a going concern", without regard for exceptional or casual factors"

Construction Montcalm, supra, at page 769.

Northern Telecom v. *Communications Workers,* [1980] 1 S.C.R. 115, at page 139 (*Northern Telecom*)

[18] ... in determining whether an entity's labour relations will be federally regulated, thereby displacing the operative presumption of provincial jurisdiction, Four B requires that a court first apply the functional test, that is, examine the nature, operations and habitual activities of the entity to see if it is a federal undertaking. If so, its labour relations will be federally regulated. ...

NIL/TU,O, supra, at paragraph 18.

5. federal jurisdiction may be either direct or derivative; a work or undertaking may itself be a federal undertaking or it may be vital and integral to the operation of another core federal undertaking.

[132] Further on in that decision, the operative rule for analyzing the facts to decide whether or not the undertaking is a transportation one, so that its extra-provincial operations can then be appraised for their constitutional significance, was expressed succinctly:

[88] The functional test requires us to assess the evidence on the record of the proceeding to determine the normal and habitual activities of Superior's business as a "going concern" without regard for exceptional or casual factors.

[133] In every case, the Board must not stray from a central teaching of the cases mentioned, which is that labour relations in Canada are presumptively a provincial matter. To reiterate what

the Board has recognized above, constitutional jurisdiction over local works and undertakings is provincial, and their labour relations are governed exclusively by provincial law, unless the work or undertaking comes within the meaning of the exceptional classes listed in section 92(10) of the *Constitution Act, 1867*. If the work, undertaking or business comes within those exceptional classes, then jurisdiction over it is federal, and its labour relations are governed exclusively by federal law.

[134] Finally, a fundamental and relevant feature of our constitutional order is exclusivity of jurisdiction of either one or the other level of government over the regulatory authority to be exercised. For labour matters and working conditions, the governing constitutional jurisdiction is exclusive, not shared.

[135] In *Bell Canada* v. *Quebec (Commission de la santé et de la sécurité du travail)*, [1988] 1 SCR 749 (*Bell Canada*), the Supreme Court of Canada settled this question, treating it as an important example of Canadian federalism. The SCC held that for federal undertakings, labour relations are matters which come under section 91(29) of the *Constitution Act, 1867*, and are thus within the primary and exclusive jurisdiction of Parliament, which precludes the application to such undertakings of provincial statutes relating to labour relations and working conditions.

[136] *Bell Canada* was one of a trilogy of cases which included *Canadian National Railway Co.* v. *Courtois,* [1988] 1 SCR 868 (*CNR*); and *Alltrans Express Ltd.* v. *British Colombia (Workers' Compensation Board)*, [1988] 1 SCR 897 (*Alltrans*), the latter of which specifically applied the constitutional rule of jurisdictional exclusivity to a trucking company, albeit one which was a federal undertaking subject to the *Code*. As stated in *Alltrans*, *supra*, by Beetz, J. for the Court:

> The three cases raise essentially the same issue: is a provincial law which regulates occupational or industrial health and safety conditions in the work place constitutionally applicable to a federal undertaking?
>
> . . .
>
> The reasons I gave in *Bell Canada* regarding the inapplicability of the *Quebec Statute* to federal undertakings dictate the same result in the case at bar. The impugned provisions of the *B.C. Statute* necessarily relate to the working conditions, labour relations and the management of the undertakings which are subject to the *B.C. Statute*. This being the case, the provisions cannot constitutionally apply to a federal undertaking. ...
>
> (pages 900 and 911)

VII. Analysis and Discussion

[137] The Board commends counsel for both parties for the efficient and forthright manner in which they placed the relevant facts before the Board, and for their able and helpful submissions, particularly in emphasizing their respective perceptions of the relative significance of various facts in light of the principles and tests established in the jurisprudence.

[138] The Board notes the agreement of counsel that the Board should use, as it must, the functional test described in the cases in determining the question before it, and the acknowledgment of counsel for the applicant that provincial jurisdiction would prevail if the functional test inquiry were inconclusive in establishing federal competence.

[139] The further recognition by applicant's counsel that it is accordingly not necessary for the Board in this case to proceed to the secondary or subsidiary stage of inquiry described by the SCC in *NIL/TU,O, supra*, of considering whether provincial regulation of the employer's labour relations would impair the core of a federal head of power under the *Constitution Act, 1867*, speaks similarly for the experience and welcome assistance of counsel in marshalling and focusing arguments on the precise issue to be decided.

[140] For the applicant invoking the Board's jurisdiction, the initial step must be to establish that the recourse and remedies it seeks are within our constitutional authority.

[141] The parties do not dispute that the employer operates a transportation business and there is no evidence before the Board which leads us to any other conclusion. Although the employer characterizes its operations as trucking and warehousing, and has mentioned that it occasionally contracts with other trucking companies to meet certain needs of its customers, claiming to that very limited extent to be engaged in freight forwarding, there is no doubt on all the evidence that the employer operates a general trucking business, and that the core activity is the handling and transportation of various materials, especially in and around Port Edward, Prince Rupert and Kitimat, B.C.

[142] Further, there is no evidentiary foundation for considering the employer's trucking operations as being severable from the use and management of its related storage yards or warehousing facilities for the purpose of this jurisdictional inquiry. The only reasonable

approach to the facts is that these operations be examined together as a single, indivisible business undertaking involving the transportation and handling of containers, materials and goods for the employer's various customers.

[143] The normal and habitual activities of Kristoff Trucking as a "going concern," without regard for occasional or casual factors, are those of a transportation undertaking, both in the usual sense and the constitutional sense. On the evidence, there is nothing to lead the Board to find that any aspect or purpose of its storage or warehousing facilities, or any related equipment or activity, is not directly connected with its main transportation business.

[144] The assertion on behalf of the employer that on occasion it contracted with other truckers to provide the service it offers its customers, in the sense of engaging in freight forwarding rather than direct performance of this work, was a very minor aspect of the employer's position, and in any event was not supported by documentary evidence. Accepting that such contractual arrangements are made occasionally when necessary, the Board is not persuaded that this case is one of freight forwarding, and certainly not one primarily involving freight forwarding arrangements, as was the case in *Fastfrate, supra.*

[145] The real issue for the Board is whether or not the employer's transportation undertaking is a federal one under the *Code.* As is evident from the preceding review of relevant jurisprudence, this has involved an examination of the arrangements under which the business operations are carried out, and of the entire substance of those operations as revealed by the facts, which have been summarized above.

[146] For the reasons which follow, the Board finds that the employer's undertaking is not a federal one, and that we do not have constitutional jurisdiction to rule on either the application or the complaint. Accordingly, both matters must be dismissed for lack of jurisdiction of the Board to deal further with them.

[147] For convenience and clarity, the Board has organized its reasoning in the following way:

A. What is the Test for Constitutional Jurisdiction over Labour Relations in Transportation in Canada?

[148] In the transportation industry, the test for determining whether the labour relations of an employer are regulated under federal or provincial law is based on the facts of the actual operations of the entity in question. The question is whether those operations sufficiently connect two or more provinces, or extend beyond the limits of a province, to constitute a federal undertaking, bringing it within the jurisdiction and control of Parliament and the federal Government of Canada as a "federal work, undertaking or business" subject to the *Code*.

B. The Nature of the Test

[149] The nature of the test is a functional inquiry into the true substance of the daily, habitual business operations of the employer. Whether of goods or of people, where motor vehicle transportation across provincial or international boundaries forms any part of a transportation business based in Canada, the Board must decide whether that aspect of the undertaking is sufficiently regular and continuous, in contradistinction to being merely casual or occasional, to bring the entire undertaking under federal jurisdiction.

C. The Essence of the Test

[150] The essential inquiry is whether the quality of any extra-provincial business activity is sufficiently regular and continuous to have the legal effect of removing the entire operation from provincial control over labour relations and placing it under the authority of federal labour law. It is not, however, simply a matter of measured ratios or proportions of corporate business activities, or comparisons of costs and revenues with those of the intra-provincial portion of the business, although available evidence which quantifies such activities is usually considered in a secondary manner as a general indicator of the true nature or quality of the operations. It is a qualitative test of the nature of the business operations, a deeper examination than mere quantitative measurements and comparisons.

D. The Purpose of the Test

[151] As mentioned earlier in these reasons, the *Constitution Act, 1867*, divides legislative authority between federal and provincial governments, assigning to each certain fields of exclusive competence. Since labour relations is not a subject specifically addressed in the *Constitution Act, 1867*, the initial step is to determine whether the work or undertaking falls under provincial or federal authority pursuant to the constitutional classification of the various matters it does address, as those have been understood by the courts. By deciding whether the extra-provincial operations of a transportation undertaking may properly be said to connect two or more provinces or extend beyond the limits of a province on a regular and continuous basis, the Board can determine whether the undertaking is a federal or provincial one, and thus can rule on whether or not the *Code* applies.

E. The Application of the Test

[152] In this case, a number of critical factors, taken together, show that the true nature of the employer's general trucking or transportation business is not one which comes within the exceptional jurisdiction of Parliament. On the whole of the evidence, the Board is not persuaded that the extra-provincial operations of the employer are sufficiently regular and continuous to displace the norm of exclusive provincial jurisdiction over its labour relations.

[153] As noted, the parties do not dispute that the test to be applied is a functional test involving a qualitative analysis of the extra-provincial work to determine whether it is "regular and continuous" as opposed to "casual," by examining the whole undertaking as a going concern. In accordance with its practice in this regard, the Board has considered the daily, habitual work operations of the employer and has determined that they are those of a general trucking business.

[154] Although the employer advertises on its website that it "has emerged as a leading regional truck load carrier in BC ... Providing local and long haul cartage throughout the BC Region and across Canada", and that its "[s]ervice area coverage includes all of BC and throughout Canada," there is no evidence of either "across Canada" or "throughout Canada" work or trips.

[155] It may be, of course, that future business operations of the employer will achieve such scope, even, perhaps, on a regular and continuous basis. But the evidence as at the date of hearing this case showed the Board a different reality.

[156] Between B.C. and Alberta, the only cross-border activity which had involved truck driving or work incidental to that, such as loading or unloading, performed by employees of the employer, was that done to transport material and equipment specifically between Edmonton, Alberta and Kitimat or Prince Rupert, B.C. All of this activity had been discontinued for lack of demand by that client group for several months before the hearing date.

[157] Between B.C. and the Yukon, there were a number of cross-border trips transporting certain materials to, and formerly a few times from, the Wolverine Mine operated by Yukon Zinc in the Yukon, north of the B.C. provincial border.

[158] For these reasons, the Board is unable to attach to the statements on the employer's website the degree of significance urged by counsel for the applicant.

[159] Although the usual, habitual and daily business of the employer is clearly centred on its base of operations at Port Edward, as well as its storage yards in Prince Rupert and Kitimat, B.C., a few trips had continued to be made into the Yukon in the summer of 2013 and up until the Board's hearing date. However, there is no evidence that any of them followed a predetermined or predictable schedule.

[160] There were and had been no standing arrangements or contracts for such extra-provincial work into either Alberta or the Yukon, and at the hearing date any prospect for more of such work into the Yukon was uncertain. However, the employer did not state that any such opportunity for work would be declined if it had or could arrange transportation capacity. Rather, the evidence showed at least some degree of interest in such business in the recent past, and some ability to take it on as well.

[161] The base of operations of the employer at Port Edward, B.C. is on the west coast of Canada. There is no evidence that it has facilities close to the northern, eastern or southern borders of B.C., or in any other jurisdiction than B.C. The driving distance from Port Edward to Edmonton, Alberta, partly through the Rocky Mountain range, is approximately 1440 km,

obviously requiring many hours on the road. The distance north into the Yukon to the Wolverine Mine would require similar driving time.

[162] These geographic facts do not alter the test the Board must apply. But they stand out in stark contrast to other situations involving transportation companies having facilities, depots, yards or offices in more than one province. They also distinguish it from transportation businesses located closer to a provincial border and travelling on roads or more easily serving customers on both sides of it.

[163] This situation certainly calls for no less intense scrutiny of the true nature of the operations than the Board would give in those cases. But the challenge remains to satisfy the test of whether a work or undertaking may in effect be characterized as connecting two or more provinces, or extending beyond the limits of a province, on the basis that it conducts the extra-provincial portion of its general transportation business on a regular and continuous basis.

[164] The realities of the great travel distances required in this case to reach a provincial border mean that such trips would not be undertaken lightly. This points to the conclusion that such work assignments would require particular arrangements, especially if they were not part of the established routine in the business operations planning of the employer.

[165] For possible use in accomplishing any of these trips outside B.C., the employer had only two tractor trucks with sleeper cabs in its fleet of 24, although they were not necessarily designated for this purpose. Yet it had managed to respond to such customer demands on various occasions, using either its own tractors and drivers or a combination of those and subcontractors.

[166] This last-mentioned factor would not be dispositive of the question in any event. But the statement is consistent with the fact that the greatest part of the activity is conducted in and around Port Edward, B.C., and with the occasional practice of subcontracting to other truckers in order to arrange such service.

[167] The facts disclose that on very few occasions, the employer had either performed or arranged to carry out several trips involving trucks driving outside B.C. on the same day. For any such extra-provincial commercial trucking, the corresponding licences and permits were required and obtained on a temporary basis. Although the employer obtained such licences only if

necessary and to the extent needed to cover the relatively few extra-provincial trips it made, it had purchased and held an annual dimensional permit required for its previous trips into Alberta.

[168] The very modest cost of $55 for an annual dimensional permit covering the entire fleet does not begin to match either the variety or level of more substantial investments made to enable such extra-provincial activity as were referred to or implied in *Pioneer* or *Autocar*, *supra*.

[169] However, one tractor truck in service in the employer's fleet of 24 had monthly or quarterly operating licences, and the corresponding insurance coverage, for use on Alberta roads, with only a short break of approximately one week at the beginning of February 2013.

[170] As noted, the employer conducted 57 extra-provincial trips in the 15.3 months prior to the date the application was filed in this case, and a total of 68 in the 21 months prior to the date of hearing, only a small number of which included back-hauls. These did not take place either weekly or monthly or in accordance with any fixed schedule, but were more opportunistic, done in response to particular demands.

[171] During part of the period surveyed, these cross-border trips did not take place at all for several months at a time. Single trips were recorded several months apart. Little consistent or recurring pattern could be discerned, other than a noticeable but short-lived increase in their number during the last three months of 2012, peaking at 13 in January 2013 and then declining rapidly by March. The Alberta source of work having ended, only approximately two trips per month into the Yukon continued thereafter.

[172] The cross-border transport jobs generated only a minor proportion of the business income, in the range of five or six per cent. They accounted for less than three per cent of its payroll, and less than four per cent of its total truck usage. However, the position of the employer and its involvement in such activity permits the inference that it was apparently not a losing proposition, and represented value for the enterprise.

[173] The licences and insurance coverages for making cross-border trips were acquired only if necessary to take on such jobs. They were not acquired in advance as a matter of course, and they were not maintained on a permanent basis after the trips requiring their acquisition and justifying their cost had been completed. The acquisition by the employer of such licences

appears to be contingent on getting the jobs, rather than demonstrating in advance this feature of its qualifications for such jobs.

[174] This is a responsive approach, reacting to manageable opportunities for such work. Taken in context, it does not reflect a steady, settled, essential or even usual part of this business operation. This practice, although it would necessarily recur on the occasions when such business is obtained, does not have the same quality as it would have if the employer carried licences at all times, as it would undoubtedly do if its extra-provincial transportation work were a steady or permanent feature of the business, built as an integral part into the planning of the trucking operations.

[175] Together with the other indicators reviewed in this case, this distinction is more than mere nuance to the Board. It tends to indicate that the true nature of the business, or the pith and substance of the core undertaking, is not, and certainly not at this time, extra-provincial transportation.

[176] In any event, even if the employer always possessed valid licences and insurance for hauling outside B.C., that would not be determinative of regular and continuous cross-border operations. This is because, as the Board ruled in *Pioneer, supra*, what matters in a functional test is the actual business operation as carried out, not what the business has the power to do, which is of little or no significance where that power has not been exercised in reality. The duty of the Board, as the cases cited recognize, is not only to assess the regularity and continuity of that exercise, but to employ and emphasize a qualitative approach in so doing.

[177] As already mentioned, the Board looks to any mathematical quantification of the cross-border part of the business, only for a general indication of whether it is regular and continuous, and as only one indicator of the real pith and substance of the business. This is so whether the information about the quantity of that activity is expressed in absolute volume or in relative terms as a portion or percentage of the work, or revenue, distance travelled or other parameter of the business operations. Percentages, if available, never stand alone as either tests or answers to the question, whether the extra-provincial operations are sufficiently regular and continuous to take the entire undertaking out of the usual provincial and into the exceptional federal–constitutional jurisdiction over labour relations.

[178] In considering whether the extra-provincial portion of the employer's operations are regular and continuous, another interesting aspect of the "licences only when necessary" approach of the employer is that this way of conducting its operations sets it apart from the "no need for pre-scheduling if standing ready with annual licences and insurance" fact patterns in both *Autocar* and *Idéal*, *supra*. To that extent at least, those decisions are less persuasive here.

[179] The facts in this case do lead the Board to characterize the extra-provincial part of the employer's operations as being "sporadic at best" in the sense of that phrase in *Pioneer*, *supra*, quoting (at paragraph 42) the Board's earlier decision in *Gray Line*, *supra*, rather than being "regular and continuous" as required to invoke federal jurisdiction. On the facts before us, sometimes months would pass without a single cross-border trip. When one did occur, or when more than one took place close together in time, these events did not recur at similar intervals, and taken together they did not form a steady pattern.

[180] The Board acknowledges that where extra-provincial trips do recur, they cannot necessarily be discounted if they are not mere isolated, rare or insignificant occurrences. The effect is never a foregone conclusion and must always be assessed in the particular context. In this case, the Board has noted that, particularly in certain relevant respects, the cross-border activities of the employer differ from those in various cases cited above in nature or kind, in scale and scope, in degree, and in order of magnitude.

[181] They differ in nature or kind from cases where the employer maintains offices, facilities, bases or depots in more than one jurisdiction, enabling a different kind of coordination in planning and different services to customers.

[182] They also differ in kind from pre-announced charter excursions common among bus lines, and from pre-set scheduled runs between destinations for which full loads, whether of people or materials, are sought after the service is scheduled, in order to make productive use of the carrying capacity which is dedicated to operating on those specific routes, and so advertised, a feature common in rail, bus and air transport.

[183] The cross-border trips in the present case are different in kind from those which are pre-arranged for fixed dates before knowing what the load factors will be, because they appear to be

a function of *ad hoc* business decisions more than they can fairly be said to represent the resolute or unwavering capture and carrying-out of a steady stream or source of business. To the extent that the employer's website claims of either readiness or willingness to haul across Canada might be viewed as a vision statement of the business, the reality of the facts before the Board does not support the conclusion that they describe the actual nature, habitual activities or daily operations of the business as a going concern. The Board views the evidence of actual cross-border trips conducted in this case as far more important in considering all the evidence, and certainly as being responsive to the functional test inquiry mandated under the applicable law.

[184] It may also be said, and it was quite forcefully argued by the applicant's counsel, that the employer's entire undertaking including its extra-provincial trips involve general hauling or trucking assignments, and that they differ in kind from more specialized transportation services. The latter can constitute a feature important in, but not restricted to, cases such as *Superior Propane* and *Schnitzer Steel*, *supra*. In those cases, the specialized nature of the transportation carried out was a function and a feature of the very nature of the business itself, characteristic of collection and delivery to customers of product or materials actually produced or acquired by the same employer. The trucking involved carried out the deliveries of their own product, either to customers, or between their own facilities and storage yards.

[185] The Board found that those employers were not really involved in the transportation business at all, because they carried primarily the very materials which were at the core of their business operations. In *Schnitzer Steel*, *supra*, for example, the employer's vehicles picked up and delivered materials other than its own steel and scrap metal only on an incidental and exceptional basis. For example, this was done if there happened to be unfilled or unused load space on one of its trucks.

[186] However, in the Board's analysis, this difference between general trucking and specialized trucking does not lie at the heart of the question to be answered. It is clear that the employer in the present case is engaged in a transportation undertaking. The question to be answered remains as stated, whether the cross-border portion of its business is conducted on a sufficiently regular and continuous basis to remove the whole undertaking from provincial jurisdiction over labour relations and make it subject to federal jurisdiction. Although the specialized deliveries by truck

in *Superior Propane, supra*, and the dedicated trucking of metal in *Schnitzer Steel, supra*, formed part of the nature of the businesses which distinguish those cases from the general trucking business in this one, the regularity and continuity of those specialized deliveries was also examined and commented on in relation to the functional approach in the Board's comprehensive analyses.

[187] The cross-border activities of the employer in the present case differ in scale and scope not only from what is mentioned on the employer's website, but from interprovincial, national or international business operations such as those in *Superior Propane, supra*. This difference simply means that the employer's trucking operations cross fewer borders.

[188] However, it will be recalled that section 2(*b*) of the *Code* speaks of an undertaking "connecting any province with any other province, or extending beyond the limits of a province." There is no less legal significance where trucking operations cross only one provincial boundary instead of many of them, as long as the border crossings have a regular and continuous quality. Even if the number of borders crossed were a relevant consideration, it would not be a particularly significant one in the Board's view, other than serving to highlight the regional or pan-Canadian scope of an enterprise, as the case may be.

[189] They differ in degree of frequency, as well as in order of magnitude, from every other case mentioned, including the 29 trips in 15 months in *Gray Line, supra*, the 43 trips in five months in *Exalta, supra*, the 164 trips in a year in *Schnitzer Steel, supra*, the contested total of either 68 or 144 trips annually in *TNT, supra*, the 24 trips almost monthly during two years in *Idéal, supra*, and the nine unscheduled charter trips over 12 months in *Stock, supra*.

[190] However, whether such comparisons are ventured and expressed in absolute numbers or in percentages as a degree of business activity, the caution remains strong that a quantitative rationale for finding interprovincial transport work to be regular and continuous is too uncertain a basis for deciding the constitutional question of whether provincial or federal law applies. The functional test in examining an employer's operations is a qualitative inquiry into the overall nature of its operations, and as already mentioned, any related measurements, however calibrated and presented, serve only as general indicators in considering and weighing all the evidence of

regularity and continuity with respect to the cross-border aspect of those transportation operations.

[191] Further, the degree of frequency of cross-border travel in each case must be appreciated in light of the different operational contexts and all the related facts. Factual comparisons, carefully considered, can be helpful but are certainly not dispositive or determinative. As the Board recently put it in *Stock, supra*, at paragraph 50:

> [50] While precedent rulings and examples of similar situations decided in the past are useful guidelines in the determination that must be made by the Board presently, each case of this nature, including the present one, must be evaluated on the merits of its own set of contemporaneous facts and circumstances.

VIII. Decision

[192] The foregoing discussion and analysis of facts and principles can now be summarized more succinctly in stating the Board's determination that the employer's undertaking is not a federal one pursuant to sections 2(*b*) and 4 of the *Code*, and that consequently, the labour relations of the employer are not subject to the *Code*.

[193] First, the Board finds that the primary focus of the employer's business is the loading, trucking, unloading and delivery of containers or materials for various customers, together with the associated storage or warehousing, vehicle maintenance and related aspects of the business such as trailer renting.

[194] There is no reason to doubt the employer's estimate that 80 to 85% of its business is conducted in and around Port Edward, B.C., and that much of this is for Quickload, the employer's principal customer, which also provides trailers for many of the jobs performed by the employer. This portrayal in summary fashion of the employer's main operations was not contested and does not conflict with the applicant's own submissions.

[195] As outlined in these reasons, the Board has interpreted and applied to the employer's cross-border operations the "regular and continuous," test as it understands the meaning and intention of that phrase in the decided cases. However, for ease of comprehension, to help avoid uncertainty and to foster and support a fuller understanding of the outcome of a study such as this one, which necessarily involves relating evidence of transportation operations to the flexible

concepts inherent in a terminology of "regular" and "continuous", a brief mention of the meaning of those two words in ordinary usage, singly and together, may be of practical assistance.

[196] "Regular" brings to mind something happening at regular intervals or cycles, whether hourly, daily, weekly, monthly or even at longer but fixed or reliably predictable intervals. There is an orderly or even methodical quality to regular activities, or conformity to an identifiable pattern, something habitual or usual or periodically repeated. It sometimes means steady or full-time, as in regular employment.

[197] None of these meanings assists the applicant's position, because the cross-border trips in question were not so usual that they could be said to be a routine part of the work assignments and operations of the employer, or included as a rule in the daily running of the business. Considering the great driving distances required to even reach the two provincial borders which were occasionally crossed, it seems not unreasonable to remark that each crossing must have constituted an occasion.

[198] Furthermore, the border crossings did not occur regularly. As reviewed above, there were months without them, a temporary increase in their number, a decline to very few per month into the Yukon, and there were none into Alberta for several months prior to the Board's hearing. The conclusion seems inescapable that they were irregular, occasional, infrequent or even episodic, and that they are more fairly portrayed and understood in their operational context as being of minor significance. This being so, the Board does not view this as a case where it can or should override the presumption in favour of provincial labour relations.

[199] "Continuous" often means simply continuing without interruption, unceasing (or in some situations the more emphatic "incessant"), constant, flowing or unbroken, and sometimes even persistent or permanent.

[200] None of these meanings fits the picture of the employer's extra-provincial operations in this case. It is difficult to visualize the various cross-border trips made as being anything more constant than occasional business opportunities seized as they arose or materialized. They did recur for the same clients, possibly inducing a conjectural view or permitting an inference that

these trips were somehow held together by established or continuing business relationships. But seen even from this generous perspective, the facts show that the actual cross-border trips took place only intermittently. Further, the prospect that such extra-provincial operations would continue was not shown to be anything but uncertain.

[201] During the period examined, the extra-provincial work in question was performed more unpredictably or even sporadically than would probably have been the case, had work of this type been planned well in advance and built into the regular operations of the business. On the evidence, this was not the case.

[202] Considering that the employer claimed to have declined some cross-border work because it lacked capacity to handle it, that it generally chose to incur the cost of licensing and insurance only when such work arose, and that on some occasions it subcontracted such assignments, the approach of the employer to handling this work could also perhaps be characterized as more opportunistic than unvarying or steady.

[203] The rule developed through the cases is that the transportation undertaking in a case like this one can be a federal one only if the nature of its extra-provincial operations is **both** regular **and** continuous. On the facts before the Board, it is neither.

[204] As well, on all the evidence and without in any way commenting on the apparent business success of the employer, it appears to the Board as a fair comment to make, that the employer is not at this juncture either permanently organized or fully equipped to provide cross-border service area coverage on a regular and continuous basis. Indeed, counsel for the employer conceded as much, and argued the point in support of its position.

[205] This is not to say, of course, that the employer cannot develop and handle more cross-border work. Should that become the case on a sustained basis, so that the extra-provincial operations may be properly categorized as a regular and continuous part of the undertaking, perhaps the question now answered will arise anew in a changed context.

[206] The Board has been particularly mindful of the caution stressed in argument, that when it considers whether the cross-border elements of the operations of the employer are regular and continuous, it should take a longer view, not a "snapshot" frozen in time. It was submitted that

the Board should not countenance an application of the regular and continuous test which fails to fully appreciate the extent of this work over the whole period of time surveyed, especially where the facts show, as they do here, that the employer can at times increase its ability to take on such work. To do so, it was argued, could permit fortuitous or other changes in customers and fluctuations in customer demand for transportation services to unduly influence the determination of the proper constitutional jurisdiction for labour relations.

[207] The Board has given due consideration to this concern and is confident that it has not overlooked any part of the evidence provided for the whole of the time period surveyed. It is also our view that the decision we have reached is consistent with sound and stable labour relations in the longer term.

[208] It is the Board's conclusion that the nature, habitual activities and daily operations of the employer are those of a local general trucking business which only occasionally and intermittently hauls goods or materials across the B.C. provincial border. At the date of the Board's hearing, the employer's trucks had not crossed into Alberta for several months, it was uncertain whether the work which had led it to make a few recent trips into the Yukon would continue, or what its volume might be, and there was no evidence that Kristoff Trucking had ever crossed the B.C. border into the United States or even intended to do so.

[209] On the evidence, there is no enduring quality to the extra-provincial business, and little or no assurance of its stability or constancy in the business operations of the undertaking. Even on the occasions when cross-border trips were undertaken several times within a single month, they appear to the Board to have remained very much incidental to the main daily trucking operations conducted locally within B.C.

[210] In the result, the Board finds that the employer's operations do not constitute a federal undertaking. They need not, and do not, engage the application of Parliament's control over matters of interprovincial transportation.

[211] Specifically, the Board finds that the business is properly characterized as a local trucking or transportation undertaking, the cross-border operations of which are neither regular nor continuous within the meaning of the relevant cases.

[212] The extra-provincial operations of the employer are not a central part of its business. As outlined above, they do not satisfy the qualitative test that they must be regular and continuous in nature to enable the whole undertaking to be classified as a federal one. They do not attain the degree of significance required to escape the presumptive application of provincial law to the labour relations of such local undertakings as a matter of property and civil rights in the province pursuant to section 92(13) of the *Constitution Act, 1867*.

[213] In summary, the normal or habitual activities of the business viewed as a going concern, without regard for exceptional or casual factors, are those of a local trucking business. A close examination of the exceptional and occasional extra-provincial cartage performed by the employer has not persuaded the Board that it is sufficiently regular and continuous to shift the entire undertaking from provincial to federal jurisdiction.

[214] The result of the Board's inquiry, applying the functional test, is conclusive of the matter: the provisions of the *Code* do not apply to the labour relations of the employer in this case.

[215] Since no federal head of power under the *Constitution Act, 1867*, applies, the Board need not and does not consider whether provincial regulation of the employer's labour relations might impair the core of any such federal power.

IX. Conclusion

[216] The result of the inquiry into the threshold question of jurisdiction in this case is that the labour relations of Kristoff Trucking are *ultra vires* the Board's constitutional authority because the employer is not a federal work, undertaking or business.

[217] As a result, neither recourse nor remedy is available to the parties from the Board, which cannot deal further with either the union's application for certification or its complaint of unfair labour practice, because it has no jurisdiction to do so.

[218] For this reason, both the application and the complaint are dismissed.

[219] This is a unanimous decision of the Board.

Graham J. Clarke
Vice-Chairperson

John Bowman
Member

Richard Brabander
Member